7 Ind. 73; *Wright* v. *Young,* 6 Wis. 127; *Wilson* v. *Williams,* 3 Jur. N. S. 810; *Davis* v. *Parker,* 14 Allen (Mass.) 94; *Park* v. *Johnson,* 4 Allen (Mass.) 259; and dicta in *Bostwick* v. *Beach,* 103 N. Y. 414; 26 AM. & ENG. ENCY. OF LAW, Ed. 2, p. 83, and WATERMAN, SPECIFIC PERFORMANCE, p. 720, support this opinion if the plaintiff had no knowledge that the defendant had a wife; but both authorities favor the majority opinion if the plaintiff did have such information.

The theory of the majority opinion is that to allow an abatement in the purchase price would in effect induce the wife to relinquish her dower right and thereby deprive her of freedom of choice, to which she is entitled by statute and by equitable principles. In accord with this view are: *Humphrey* v. *Clement,* 44 Ill. 299; *Reisz's Appeal,* 73 Pa. St. 485; *Clark* v. *Seirer,* 7 Watts (Pa.) 107; *Lucas* v. *Scott,* 41 Oh. St. 636; *Graybill* v. *Brugh,* 89 Va. 895; *Barbour* v. *Hickey,* 2 App. (D. C.) 207. In 6 POM. EQ. JUR., p. 1369, note, it is said: "Of course if the vendee knows the vendor is a married man * * he is not entitled to compensation." 26 AM. & ENC. ENCYC. OF LAW, Ed. 2, p. 84, is to the same effect; 2 WARVELLE, VENDORS, p. 893, is as follows: "The rule * * * receiving the highest sanction * * * provides that the vendee may have conveyance * * * without the retention of any part of the purchase money to indemnify him against the contingent interest of the wife."

The principal case is one of first impression in Missouri; the decision by four judges, with three dissenting, is fairly representative of the conflict among cases and text writers. If the plaintiff knew that the defendant was married, there is no injustice in requiring him to pay the full price if he has specific performance, for the refusal of the wife to relinquish her right was a possibility that he must have considered in making the contract. Even though he was unaware of this fact it would be better to require him either to pay the full price or to resort to his action for damages, because an abatement of the purchase price would have a tendency to induce the wife to sign, and thereby destroy her freedom of choice. F. O.

AN EXECUTOR'S RIGHT TO AN ALLOWANCE OUT OF THE ESTATE FOR COUNSEL FEES FOR SERVICES RENDERED BEFORE LETTERS TESTAMENTARY ISSUE.—A question of interest to the profession and to the public generally is involved in a recent California case: *In re Riviere's Estate,* 98 Pac. 46. Riviere died possessed of an estate valued in excess of $50,000.00, and left a paper writing purporting to be his last will and testament, in which B. was named as executor. B. offered it for probate as such, whereupon interested parties contested its admission. Counsel was employed by B. to present his case, and, as a result, the alleged will was admitted to probate. It was moved that the court make an allowance out of the estate for services rendered the executor under § 1616, CODE CIV. PROC., which provides: "Any attorney who has rendered services to an executor or administrator may at any time during the administration * * * apply to the court for an allowance to him-

self of compensation therefor." The granting of the motion was objected to on the ground that no attorney's fees can be allowed against an estate for services rendered before the will is admitted to probate, on the authority of *Miller* v. *Kehoe,* 107 Cal. 340, 40 Pac. 485, where it is said, "Counsel fees are not recoverable by a successful party in an action either at law or equity, except in the enumerated instances where they are expressly allowed by statute." Citing *Estate of Olmstead,* 120 Cal. 454, 52 Pac. 804. The court in overruling the objection and allowing the fee said that this code provision "should receive such construction as would include services rendered the executor in the performance of *any* duty devolving upon him by the terms of the will, including the duty of prosecuting necessary and proper proceedings toward the establishment of such will." An executor's right to employ counsel depends upon the right to litigate. To successfully litigate the employment of counsel becomes necessary, and to maintain that the expenses of such counsel are not a proper charge upon the estate would be an anomaly. Undoubtedly the decision reached is one that common sense and justice would alike dictate. In the *Estate of Olmstead,* supra, which the appellants cite, and which the court distinguishes from the principal case, the California court makes just as strict an interpretation of this same code section as is here quoted as its latest interpretation is liberal. In the *Estate of Olmstead,* decided in 1898, the essential facts were similar to those of the principal case, except that the contestants were successful and the alleged will was not admitted to probate. Counsel was not allowed compensation out of the estate for his services on the ground that letters testamentary not being granted there was no executor to whom services were rendered, and the code provision does not warrant payment except for services rendered an executor or an administrator. Manifestly if the decision in the Olmstead case is to stand as the law of California, one named as executor in a purported will must be personally liable to his attorney in case the will is not proved. Such a situation will discourage an executor in an endeavor to establish the will of his testator where there is an interested and energetic contestant. Obviously intestacy will result in a greater number of cases, whereas the policy of the law, as is well known, and as indeed the principal case points out, is in favor of testacy.

The courts of other states have not permitted such an unfortunate situation to arise. In the recent case of *In re Title, Guarantee & Trust Co.* (1907), 100 N. Y. Supp. 243, 114 App. Div. 778, 188 N. Y. 542, 80 N. E. 1121, an executor, seeking in good faith to uphold a will disposing of an estate worth several millions of dollars as against an attack of a beneficiary, was permitted to be reimbursed from the estate the amount legitimately expended in litigation even though the same resulted in a judgment for the beneficiary. Where an executor had reasonable grounds to take an appeal from a decree denying probate of the will, he was entitled to his necessary reasonable counsel fees in the Supreme Court * * * to be paid out of the estate: *Gardner* v. *Moss* (1906), 29 Ky. Law Rep. 759. 96 S. W. 461. In *McNaughton* v. *McGreagor* (1907), 133 Wis. 494, 113 N. W. 956; *In re Bowman's*

Will, Id., it was said that since an executor is called upon at the death of the testator to present the will for probate, and that necessarily resulted in contesting a subsequent will offered for probate, he is entitled to costs and disbursements in the Supreme Court on appeal, on the affirmance of a judgment allowing probate of the subsequent will. And in *Wier* v. *Wier* (1906), 28 Ohio Cir. Ct. R. 199, it is said that the question as to whether or not an executor may be allowed credit on his account for expenses incurred in the successful defense of a will contest depends upon the circumstances of each particular case; and, further, while an executor is not bound to assume the defense of a will contest, he may do so, and where this is done in a disinterested effort to maintain it and preserve the trust therein created and to effectuate the intention of the testator, a court of chancery may allow the executor credit in his account for the expenses incurred.

Statutory provision for the payment of the fees of the executor's attorney out of the estate, whether the services were rendered before or after letters testamentary issue, and whether the will is probated or not—provided always that the purported will is offered for probate in good faith—would be a commendable legislative act. Such statutes, being in derogation of the common law, will be strictly construed by the courts, and that they should be carefully drawn by someone learned in the law is the lesson taught by the questions litigated in the foregoing cases. J. E. O., JR.

THE KANSAS "MANHATTAN COCKTAIL CASE" AND SOME OTHERS CONCERNING JUDICIAL NOTICE.—Some anti-prohibitionists may think they have an "eye-opener" in the recent Kansas decision that judicial notice will be taken of the intoxicating properties of a Manhattan cocktail: *State* v. *Pigg,* 97 Pac. 859.

Pigg complains to the supreme court that he was charged with an "unlawful sale of intoxicating liquor" and that on one count the state elceted to rely upon a sale of two Manhattan cocktails; that he was convicted, although there was no evidence that a Manhattan cocktail is intoxicating. On this point the court says: "The Century Dictionary defines a cocktail as 'An American drink, strong, stimulating, and cold, made of spirits, bitters, and a little sugar, with various aromatic and stimulating additions.' The particular kind of cocktail under discussion is popularly understood to have taken its name from the island whose inhabitants first became addicted to its use. While its characteristics are not so widely known as those of whisky, brandy, or gin, it is our understanding that a Manhattan cocktail is generally and popularly known to be intoxicating." The judgment of conviction is affirmed by a full court.

Local circumstances and the customs of the time have much to do with the determination of the question as to what matters courts will judicially notice, and it may be suggested that a judge should not close—say, his eyes —to those sources of information that are open to all about him. However,